STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

MODESTO TEACHERS ASSOCIATION, CTA/NEA, Charging Party, v. MODESTO CITY SCHOOLS AND HIGH SCHOOL DISTRICT, Respondent.	)	Case No. S-CE-741 PERB Decision NO. 518 August 26, 1985

Appearances: Kirsten L. Zerger, Attorney for the Modesto Teachers Association, CTA/NEA; Breon, Galgani, Godino & O'Donnell by Sharon M. Keyworth, Attorney for Modesto City Schools and High School District.

Before Hesse, Chairperson; Jaeger and Burt, Members.

DECISION

BURT, Member: This case is before the public Employment Relations Board (PERB or Board) on exceptions filed by the Modesto City Schools and High school District (District) to the attached proposed decision of an administrative law judge (ALJ) finding that the District violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA)[1] by its failure to provide information in connection with

[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

Section 3543.5 provides, in relevant part:

> It shall be unlawful for a public school employer to:

grievances. The Modesto Teachers Association, CTA/NEA (Association) also filed exceptions, excepting to the ALJ's failure to award costs of litigation.

On exception, among other things, the District renews its claim that the information requested with regard to the Leonard Choate grievance was irrelevant. We find that issue adequately disposed of by the ALJ's decision, with one exception. The District argues throughout that information regarding previous requests for "personal leave" was irrelevant, since Choate had only made a request for either "partial paid leave" or "personal necessity leave." The ALJ makes clear that his discussion of relevance is intended to apply only to information regarding the two latter categories of leave request, since the request for "personal leave" information was not covered by the complaint. His proposed order, however, does not clearly exclude information regarding "personal leave" from production. The Association makes no

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> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

argument why "personal leave" information is relevant, and we therefore clarify the proposed order to exclude production of that information.

We also reject the Association's claim that litigation costs should be awarded in this case, In King City High School District Association, et al. (Cumero) (1982) PERB Decision No. 197 (S.F. 24905, hearing granted July 12, 1985), the Board adopted the National Labor Relations Board's standard for determining when fees should be awarded in unfair practice cases.

> [A]ttorney's fees will not be awarded to a charging party unless there is a showing that the respondent's unlawful conduct has been repetitive and that its defenses are without arguable merit. (P.26.)

See also Heck's, Inc. (1974) 215 NLRB 765 [88 LRRM 1049], holding that fees are not appropriate where defenses are at least "debatable." We do not find that standard to have been met here, and we therefore decline to award costs of litigation to the Association.

The Board has reviewed the entire record, including the exceptions filed by the District and the Association. Finding no prejudicial error in the ALJ's findings of fact or conclusions of law, we adopt his decision as that of the Board itself as clarified by the discussion above.

ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in the case, it is hereby ORDERED that

the Modesto City Schools and High School District and its representatives shall:

1. CEASE AND DESIST FROM:

(a) Failing and refusing to provide the Modesto Teachers Association, CTA/NEA, with all relevant information and documents needed by the Association to prosecute contract grievances on behalf of certificated employees of the District.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

(a) Upon request by the Modesto Teachers Association, CTA/NEA, provide to the Association the requested information regarding art classes at Downey High School, and regarding partial paid and personal necessity leave.

(b) If the Modesto Teachers Association, CTA/NEA, seeks to reopen the grievances filed by Patricia Gurney and Leonard Choate, or seeks to reopen an arbitration proceeding concerning those grievances, refrain from interposing any procedural objection such as timeliness or res judicata to the reopening sought by the Association.

(c) Within thirty-five (35) days following the date this Decision is no longer subject to reconsideration, post at all work locations where notices to employees customarily are placed, copies of the Notice attached as an Appendix hereto, signed by an authorized agent of the employer. Such posting shall be maintained for a period of thirty (30) consecutive

consecutive workdays. Reasonable steps shall be taken to insure that this Notice is not reduced in size, defaced, altered or covered by any material.

(d) Written notification of the actions taken to comply with this Order shall be made to the Sacramento regional director of the Public Employment Relations Board in accordance with his/her instructions.

Member Jaeger joined in this Decision.

Chairperson Hesse's concurrence begins on page 6.

Hesse, Chairperson, concurring: I agree with the majority decision that the employer must provide the Association with personal partial paid leave request and personal necessity leave request information.[1] In so doing, I cannot adopt portions of the proposed decision relating to the credibility of witness Mel Jennings and the discussion of the attorney's fees award. My concern is that this dicta may be used in future cases to charge a "fixed anticipatory prejudgment" or "personal bias" against this Board. In re Marriage of Fenton (1982) 134 Cal.App.3d 451. I realize such bias and prejudgment does not exist with this ALJ nor the Board itself, but some readers may not be so convinced. By this separate concurrence, I wish to avoid such controversies in the future.

At great length, the ALJ states the reasons for discounting the testimony of the employer's principal witness, Mel Jennings, even though Jennings' testimony was not directly impeached by the Association.[2] Further, Jennings' testimony regarding the

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[1] I would further restrict production of personal necessity leave information to those requests made in accordance with "the professionally related conference or class" and "the participation in special events or honors" provisions of Article V in the 1982-84 collective bargaining agreement. The initial grievance submission form states an intent to apply the two provisions. Therefore, production should be limited to requests made under these provisions.

[2] Jennings' testimony was in support of the employer's claim that the request was burdensome. Jennings testified that it would take "up to 10 minutes" to search each personnel file for the requested information. On cross-examination, the Association was able to get Jennings to modify his estimate to "eight to ten minutes".

"Karam" case was discounted, yet the Karam case was settled two years prior to the hearing and is not an issue in the instant case. So, it is hardly surprising Jennings' testimony was "evasive" or "reluctant." These credibility resolutions do not appear to consider the standard set by the California Supreme Court in Martori Brothers Distributors v. Agricultural Labor Relations Board (1981) 29 Cal.3d 721. The Court said:

> An administrative agency must accept as true the intended meaning of uncontradicted and unimpeached evidence. (Id., at p. 728.)

Jennings' testimony cannot be measured by isolating the fact that the employer presented only one witness, thus impliedly finding it immaterial that the Association did not present contradictory evidence or rebuttal witness.

In similar decisions, the Board has given great deference to the credibility resolutions of the ALJ, but those credibility determinations are not absolute. This Board is empowered to consider the entire record and is free to make its own credibility determinations. Santa Clara Unified School District (1979) PERB Decision No. 104; Los Rios Community College District (1985) PERB Decision No. 499. Here, the demeanor evidence resolution is not challenged. I simply cannot divine a "rational basis" (Martori, supra, 728) for disbelieving Jenning's testimony, in toto. Some significance must be accorded to the absence of contradictory, rebuttal evidence on both the relevance and burdensomeness of the information request made on behalf of Leonard Choate.

While the ALJ seemed to feel that the substance of the employer's claims were doubtful, I do not find the employer's defenses to be either frivolous or without arguable justification. Due to the timing of our decision in another case with the same parties, and the sustainment of the irrelevant defense of the personal leave information request, I heartily concur with the majority finding on litigation costs.[3]

[3]See Modesto City Schools and High School District (1985) PERB Decision No. 479 where the employer is ordered to produce information requested by the Association. It should be noted that PERB Decision No. 479 issued two months after exceptions were filed here. There was insufficient time for the employer to settle and withdraw the exceptions to this case.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the state of California

After a hearing in Unfair Practice Case No. S-CE-741, Modesto Teachers Association, CTA/NEA v. Modesto City Schools and High School District, in which all parties had the right to participate, it has been found that the Modesto City Schools and High School District violated Government Code section 3543.5(a), (b) and (c).

As a result of this conduct, we have been ordered to post this Notice and will abide by the following. We will:

1. CEASE AND DESIST FROM:

(a) Failing and refusing to provide the Modesto Teachers Association, CTA/NEA, with all relevant information and documents needed by the Association to prosecute contract grievances on behalf of certificated employees of the District.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

(a) Upon request by the Modesto Teachers Association, CTA/NEA, provide to the Association the requested information regarding art classes at Downey High School, and regarding partial paid and personal necessity leave.

(b) If the Modesto Teachers Association, CTA/NEA, seeks to reopen the grievances filed by Patricia Gurney and Leonard Choate, or seeks to reopen an arbitration proceeding concerning those grievances, refrain from interposing any procedural objection such as timeliness or res judicata to the reopening sought by the Association.

Dated: _____

MODESTO CITY SCHOOLS AND HIGH SCHOOL DISTRICT

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

MODESTO TEACHERS ASSOCIATION, Charging Party, v. MODESTO CITY SCHOOLS AND HIGH SCHOOL DISTRICT, Respondent.	)	Unfair Practice Case No. S-CE-741 PROPOSED DECISION (10/9/84)

Appearances; Ken Burt and Kirsten Zerger for the Modesto Teachers Association; Keith Breon and Sharon Keyworth (Breon, Galgani, Godino & O'Donnell) for the Modesto City Schools and High School District.

Before; Barry Winograd, Administrative Law Judge.

PROCEDURAL HISTORY

The issue to be decided in this case is whether the employer unlawfully failed to provide information relevant to the evaluation and pursuit of two contractual grievances. On March 14, 1984, the Modesto Teachers Association (hereafter Association) filed this charge against the Modesto City Schools and High School District (hereafter District). The charge alleged that a variety of employer actions were unlawful, including the refusal to provide information in connection with grievances.

The General Counsel's office dismissed part of the charge on April 27, 1984 and an amended charge was filed on May 14,

1984. Part of the amended charge was dismissed on May 21, 1984, and, on the same date, a complaint issued on the remaining allegations. (The Association is presently appealing the partial dismissal of its charge.)

The complaint alleged that the District refused to provide relevant information in connection with contractual grievances in violation of sections 3543.5(a), (b) and (c) of the Educational Employment Relations Act (hereafter EERA or Act).l

The District filed its answer on June 11, 1984, admitting its status as the employer and the Association's as exclusive

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[1]The EERA is codified at section 3540 et seq. of the Government Code and is administered by the Public Employment Relations Board (hereafter PERB or Board). Unless otherwise stated, all statutory references in this decision are to the Government Code. Section 3543.5 provides in relevant part that it shall be unlawful for a public school employer to:

> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

The General Counsel's complaint alleged that the District's conduct constituted a failure and refusal to bargain in good faith, violating section 3543.5(c), and that the conduct also was a derivative violation of sections 3543.5(a) and (b). The complaint that issued covered three grievances, but one of the disputes was withdrawn prior to the start of the formal hearing,

representative, but otherwise denying the allegations of the complaint. The District also advanced affirmative defenses which will be considered below.

A settlement conference was conducted on June 11, 1984, but the case was not resolved. The formal hearing was held on July 30, 1984, in Stockton, California. Post-hearing briefs were filed by the parties and the matter was submitted for decision on September 21, 1984.

FINDINGS OF FACT

A. Background.

At the time this case arose, the District and the Association were parties to a three-year collective bargaining agreement that was in effect through June 1984. The contractual grievance procedure was designed,

> . . . to secure, at the lowest possible administrative level, equitable solutions to the problems which may from time to time arise concerning the interpretation or application of this agreement. (CP.Ex. 1, p. 3-1.)2

The first step of the procedure, after at least one private conference between an employee and a supervisor, required a written filing by either the Association or an aggrieved employee with the appropriate building administrator. The second step was an appeal to the District's superintendent.

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[2]Charging party exhibits will be designated as "CP.Ex." and Respondent's as "Resp.Ex."

The third step involved advisory arbitration. At the fourth step, the superintendent (but not the Association or an employee) could appeal an arbitration decision to the board of education for a final, binding decision.

Use of the arbitration procedure served as a waiver of legal or statutory rights related to the grievance. However, if a decision favorable to a grievant was rejected by the school board, legal remedies could be pursued.

While the contract did not contain language expressly providing for disclosure by the employer of information relevant to pending grievances, the arbitration provision did state that the parties would be afforded,

> . . . a reasonable opportunity to present evidence, witnesses and arguments. (Id., p. 3-5.)

Thereafter, the arbitration provision limited the arbitrator to,

> . . . consider only those issues which have been properly carried through all prior steps of the Grievance Procedure. Neither party on its own initiative shall be allowed to introduce evidence to the arbitrator which was known but not introduced prior to Step III. (Id., p. 3-5.)

The overall time limits of the grievance procedure indicating the passage of days at each level were,

> . . . considered a maximum, requiring every effort to expedite the process. (Id., p. 3-6.)

Regarding expenses, the grievance procedure stated that each party was,

> . . . responsible for payment for the cost of preparing its case. (Id., p. 3-5.)

Specific provisions of the collective agreement related to the grievances in this case will be discussed hereafter in connection with those disputes.

During the life of the three-year bargaining agreement the Association had a grievance processing committee to oversee the investigation and pursuit of claims, working in conjunction with Ken Burt, the organization's executive director. The committee was chaired by Kathleen Hackett, a teacher. After an employee seeking to file a grievance would present the problem, a committee member would be assigned to investigate the facts, perhaps hold a private meeting with a supervisor, and report back to the grievance committee as a whole. If settlement was unsuccessful, the committee would decide whether to initiate formal proceedings. If the committee decided against a formal grievance, an employee could appeal this decision to the Association's executive board. Hackett testified that a common and important aspect of this merit-determination process involved checking the grievant's account. Sometimes this required verification of the account from information in possession of the employer. In the end, the assembled evidence was weighed to decide whether the Association would go forward with a formal grievance on behalf of the employee.

B. The Gurney Grievance.

Patricia Gurney had worked as a temporary art teacher in

the three years preceding the 1983-84 school year. However, in September 1983, before again being notified of her status as a temporary employee, she was classified as a substitute and was paid a substitute teacher's salary for the first three weeks of school. Under the contract, temporary teachers are included within the bargaining unit, while substitutes are expressly excluded. Further, a letter of understanding appended to and incorporated in the main agreement provided that it was a,

> . . . goal of the District to maximize reemployment of competent and qualified 1980-81 and 1981-82 temporary employees. (CP.Ex. 1, p. 1-3.)

The letter of understanding also stated:

> The District shall make a good faith effort to classify current temporaries, when reemployed, as probationary employees whenever the employment situation of the District allows it to do so. (Ibid.)

After investigation, the Association filed a grievance on Gurney's behalf in November 1983, alleging violation of the letter of understanding as well as the recognition and salary provisions of the agreement. The grievance asserted that there had been sufficient scheduled teaching work to have warranted hiring Gurney as a regular classroom employee, not as a substitute. The grievance observed, in support of the claim, that a counselor had been assigned to teach two art classes, and that a part-time teacher also had been hired.

The grievance submission requested production, in writing, of certain information:

> A. Please indicate if art classes were scheduled at Downey High School prior to September 1, 1983. If so what was the projected enrollment.
>
> B. Who if anyone was scheduled to teach art at Downey High School prior to September 1, 1983, for the 1983-84 school year.
>
> C. On what date in the 1983-84 school year were art classes offered at Downey High School. (CP.Ex. 2-A.)

In December 1983 the District denied the grievance at the first level, setting forth an account of Gurney's hiring as a substitute and her switch in late-September to temporary teacher status. At the end of the written response, the school principal stated:

> The information requested will follow. (CP.Ex. 2-B.)

The response was routed to Gurney and the Association through the office of the District's director of personnel, Mel Jennings.

Later in December the grievance was appealed to the superintendent. The request for information was repeated.[3]

On January 11, 1984, the superintendent denied the grievance (again, via Jennings). The superintendent stated that Gurney knew and agreed when she was hired as a

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[3]The three areas quoted above were restated. A fourth question was added:

> Also, was it the principal's belief that this

substitute that her future status depended on enrollment fluctuations. The superintendent explained that there was a "discrepancy at the beginning of the school year" between the central administration's projections and the high school principal's "projections as to the need for Art teachers." (CP.Ex. 2-D.) The superintendent implied that the principal made a higher estimate, but figures were not provided. No reference was made to the information previously requested by the Association and the grievant, although information had been promised in the principal's first-level response.

Arbitration was sought soon thereafter. A decision was rendered in June 1984. (See Resp.Ex. 1.) In denying the grievance the arbitrator did not specify in the findings of fact the enrollment projections used by the school principal and the central administration. Apparently relying on previously undisclosed facts, without reference to the contract's evidence bar, the arbitrator concluded that the lower central staff figures were utilized for the purpose of hiring a substitute at the start of the school year, a decision that he found was within the realm of management rights under the contract. The arbitrator acknowledged that Gurney performed work consistent with her prior service as a temporary

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staff position was needed at the beginning of the year? (CP.Ex. 2-C)

teacher, but characterized this as an equitable consideration that was irrelevant to the narrow contract issue of whether Gurney, hired as a substitute with an uncertain future tied to enrollment fluctuations, was covered by the contract.[4]

Evidence adduced at the unfair practice hearing showed that as early as spring 1983 the high school principal had developed enrollment projections based on student course-preference balloting. This information was used in conjunction with an overall allotment of teaching positions determined by the central administration. Taking these figures together, the principal prepared a breakdown determining the specific number of courses offered, and the number of teachers utilized, in different subject areas. In July 1983 a master class schedule was produced for the high school. This schedule listed the art classes and teachers projected for fall 1983. (See, generally, Reporter's Transcript (R.T.), pp. 46-50.)

Gurney was not called as a witness by either party. However, the District did offer a transcript of Gurney's tape-recorded testimony at the arbitration hearing to show, in

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[4]The only passage in the arbitration decision that related to the prior request for information stated:

> This information appears not to have been furnished in writing by the District, it being the testimony of District witnesses that the information was in possession of the Grievant and the Association. (Id., p. 9.)

support of its affirmative defense, that she already possessed the answers to the questions propounded in her grievance.[5] Unfortunately, the reliability of the transcript is doubtful because at several key portions of the testimony, the tape recording was "inaudible," in the words of the transcriber. To the extent the transcript suggests that Gurney knew some information, such as the art classes that had been scheduled and the permanent art teachers in prior years, Gurney was quoted as not knowing before September 1983 who actually would be teaching. (Resp.Ex. 4, pp. 37-38.) Regardless of the inference of some knowledge, there was no evidence in the transcript or at the hearing that Gurney or the Association knew the projections upon which assignments and classifications were based.[6]

C. The Choate Grievance.

In November 1983 teacher Leonard Choate requested a

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[5]The transcript was submitted after the hearing, and the Association was given an opportunity to check the accuracy of the copy offered. No objection having been made, it has been marked as Resp.Ex. 4.

[6]During the hearing, the District introduced class size and staffing figures prepared at the end of September 1983 and distributed to the Association, apart from the Gurney grievance, pursuant to a contract reporting requirement. Admittedly, pre-school projections were not included in the report. The employer argued that this report was the limit of its contractual responsibility and underscored its management prerogative to make staffing determinations free from grievance challenges. This legal argument will be considered below.

three-day leave of absence to attend a National Aeronautic and Space Administration (NASA) conference coinciding with a space shuttle landing in California. Under the contract, there are 20 different types of leave described. According to the grievance record, Choate sought the time off either as "partial paid leave" or as "personal necessity" leave.[7] The grievance record indicates that Choate attended the conference after his absence requests were denied, using accumulated sick leave, and that the District stated he would be given a notice of unauthorized absence.

Choate's grievance was filed in January 1984, alleging entitlement to the leave of absence under the contract and also

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[7]"Personal partial-paid leave" was available for up to five working days a year for "personal business which can be performed only during school hours." (CP.Ex. 1, p. 5-21.) Accompanying a spouse on vacation and recreation were listed as examples. On this type of leave an employee would receive a regular salary, less the cost of a substitute. "Personal necessity leave" was limited to six days per year, with full salary to the extent of accumulated sick leave. This leave could be used for designated reasons "with notification but without advance permission." (Id., p. 5-23.) One of the reasons was:

> [E]xtenuating circumstances where it is necessary for an employee to be absent for reasons that cannot be taken care of before or after school or on weekends or holidays. (Limited to not more than three (3) of the six (6) days.) (Ibid.)

Cited as examples of this category were attendance at professionally related conferences or classes, and participation in special events.

claiming discrimination. The grievance requested written information from the employer:

> A. Please supply all requests for personal necessity leave, personal leave, and partial paid leave for the 1982-83 school year and to date for the current school year 1983-84.
>
> B. Please provide back-up sheets for the requests (any documents attached or filed with the requests explaining the request). (CP.Ex. 3-A.)8

In February 1984 the school principal denied the grievance, relying on the District's discretion to grant leaves and arguing that the purpose of the conference was not related to Choate's teaching duties. No mention was made in the principal's response of the prior request for written information. The principal's denial was routed through Jennings for distribution to Choate and the Association.

In late-February, the Choate grievance was submitted at the next step, again requesting production of written information related to leaves of absence.

The superintendent's denial was given in March 1984, and

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[8]Although the grievance documents do not specify "personal leave" as one for which Choate applied, his grievance stated that he was entitled to that leave as an alternative. Jennings testified that in the pre-absence discussion with Choate, "he was trying for any kind of leave that might allow him to go." (R.T., p. 53.) Perhaps because the documentary grievance record did not clearly show a request for "personal leave," the PERB complaint in this case involves only the information sought about the "partial paid" and "personal necessity" leaves. This decision will be limited accordingly.

was distributed by Jennings to the parties. The denial stated the policies that were applied by the District to the types of leave in dispute, and offered a contract interpretation that varied from the Association's. The superintendent also addressed the request for information:

> Your request for information is overly burdensome, violates the privacy rights of other employees and is not relevant to your grievance. The information you requested would require a search of all certificated personnel files. Since only your leave request is at issue, such an expenditure of time, money and effort is both irrelevant and burdensome. Furthermore, you are not entitled to information in the personnel files of other employees since the privacy of personnel files is protected by statute. (CP.Ex. 3-D, emphasis in original.)

The superintendent was not called as a witness by respondent to elaborate upon these objections, or to describe the information and analysis upon which he relied.

Several days later, the Association wrote to the superintendent disputing his assertion that providing the information would violate employee privacy rights, but noted that,

> . . . to resolve this matter we are willing to have the names blocked out by some third party or other neutral procedure which provides the information to the Association but does not require the specific identity of the persons to be disclosed. (CP.Ex. 4.)

There was no evidence showing any response to the Association's follow-up proposal. Further, there was no credible evidence that the District at any time offered any

compromise to ease the alleged documentary search burden or privacy issue described by the superintendent.[9]

At the unfair practice hearing, respondent did present some evidence by Jennings attempting to substantiate the employer's burden claim. He testified that it would take 8 to 10 minutes to search each file for the requested information.[10] Jennings also identified listings that showed the number of "partial paid" and "personal necessity" leaves that had been

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[9] In Jennings' testimony there was a vague suggestion that counsel for the employer may have made a compromise proposal, although Jennings did not know of and was unsure whether any specific offer was conveyed. Jennings also did not know if the possible discussion took place before or after the unfair practice charge was filed. (See R.T., pp. 71-72, 78.) Neither Keith Breon nor Sharon Keyworth, the attorneys identified by Jennings, were called as witnesses in connection with Jennings' speculation.

Jennings' testimony also suggested that there were no District proposals to have the Association pay for search and photocopying costs because the organization had failed to pay past bills for similar service. However, on cross-examination, Jennings admitted that in the past there had been only one such bill presented—for one page of copying—and that the District settled the matter after an unfair practice charge had been filed challenging the action. (See R.T., pp. 74-75.)

[10] Initially, Jennings stated that each search would require 10 minutes. On cross-examination, after Jennings was asked to describe the proximity of the clerical staff to the files and photocopying equipment, the way in which the files were maintained (that is, recent information on top), and the amount of time it would take to photocopy one or a few pages of paper, he begrudgingly modified his estimate and stated with a sarcastic expression that it might take only 8 minutes to search and copy relevant documents in a file. Compare R.T., pp. 56, 57-63.)

granted.[11]

Beyond the time estimate and lists, the District offered no evidence at the hearing related to the costs of staff time, nor of other staff duties and priorities, nor of its affirmative defense that the Association's request was "a means of harassment."

A final aspect of the testimony relevant to the burden issue involved Jennings' reluctant and piecemeal admission, during cross-examination, that a year or two ago, a prior case regarding an employee named Karam involved a disclosure request similar to the request in the Choate case. Jennings conceded that, at first, the District had declined to provide the leave of absence information sought by the Association, but later, after an unfair practice charge was filed, the dispute was settled and the records were checked. (Compare R.T., pp. 63-64, 69, 76-77.)

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[11]Jennings identified lists prepared as part of the school board's twice-monthly consent calendar, during which administratively-approved leaves were authorized by the board of education. Jennings stated that few leave requests were ever denied. (R.T., p. 58.) The photocopied lists were not prepared by Jennings directly or under his supervision, but, based on other representations, their accuracy seems likely in that they were probably compiled by the Association as part of an attempt to settle the unfair practice case. When the number of leaves granted during the relevant time are computed (i.e., September 1982 to December 1983), the total is 205. The lists did not contain a breakdown showing personal necessity leaves for professional purposes or for special event participation, perhaps the two most probative areas to be examined in connection with the grievance.

Regarding the District's privacy claim, the District offered no evidence beyond the superintendent's assertion in his letter that the "privacy of personnel files is protected by statute." Hence, there was no evidence presented of any school board policy, either written or in practice, regarding confidentiality of leave of absence materials. Indeed, the form submitted by Choate, identified as the standard request document, bears no indication of expected confidential treatment. Instead, a number of officials are noted on the document as within the possible realm of handling or review, including building principals, supervisors, personnel office staff, and the superintendent's executive council. Jennings also testified that the consent calendar was a public agenda item, and that a leave of absence approved by an administrator could be called off the consent calendar for discussion. (R.T., pp. 62-63.) On final redirect examination, Jennings answered leading questions by adding that the school board "should" go into executive session for confidential discussion of such a request. (R.T., p. 79.) However, there was no evidence that this was the case with each request called for discussion, much less that it was required by any school policy or applicable law.[12]

12[12]It is apparent that some types of contract leave requests, on their face, might more than others entail personal

Finally, observations are warranted regarding Jennings' credibility, since his testimony was almost exclusively devoted to the Choate case and he provided some factual information to support the District's justification defense.

Jennings' demeanor as a witness undermined confidence in his testimony. Jennings was defensive and easily angered by cross-examination that probed his account or recollection of several subjects, and his answers were often evasive, reluctant and contradictory. These problems were especially evident when Jennings was asked questions about documentary search-time estimates, alleged copying bills sent to the Association, school board calendar procedures, and the Karam case. The content of his testimony related to these matters has been described above.

Compounding these testimonial weaknesses, Jennings demonstrated extreme personal hostility toward Burt, who served as the Association's trial counsel in addition to his day-to-day function as the Association's executive director. For example, instead of responding directly and succinctly to

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matters warranting private deliberation. For example, among the various leaves mentioned in the contract are those for "long term illness," "bereavement," "hospital confinement of members of immediate household," "pregnancy disability," and "child care." In comparison, other leaves suggest less of a concern for privacy: for example, "legislative," "association," "peace corps," "jury duty," "military," and "organization" leaves, to mention a few.

Burt's questions about whether he recalled the Karam case, Jennings initially testified:

> I remember you asking a lot of ridiculous, making a lot of ridiculous requests for information that, whether you did on that one or not I don't really remember. (R.T., p. 64.)

During examination by the administrative law judge, Jennings avoided a direct response and attacked Burt when answering a question about whether he remembered the initial information request in the Choate case:

> . . that is the standard practice of Ken Burt. He will ask for everything including the kitchen stove on all grievances. If you notice each of his grievances . . . every one of his grievances are standard, and he put in a lot of extraneous information as a standard practice, and you can look at 100 of them and you will see 100 requests for everything. (R.T., p. 68.)

Jennings admitted that neither he nor the school principal raised an irrelevance objection in their initial communication denying the Choate grievance at the first step. Indeed, there was no response at all to the Association's request. And despite the harassed and bitter tone accompanying Jennings' quoted remarks, there was no evidence offered that he or the District had ever challenged Burt for alleged abuse of the grievance process by "including the kitchen stove on all grievances," or for Burt's "standard practice" of making "100 requests for everything." In short, at the unfair practice hearing Jennings vented his personal hostility, but it was animosity without any apparent substance.

In addition to the shortcomings previously described, Jennings' testimony suffered from his failure to offer important information or explanations. This deficiency was accentuated because he was the District's principal witness and the superintendent was not called. Thus, there was no testimony explaining the late second-step assertion of burden and privacy objections in the Choate case, or, the absence of any stated objection in the Gurney proceeding (at least until the arbitration and unfair practice proceedings). Since Jennings, as personnel director, monitored grievance processing for the employer and distributed all relevant District responses prepared by site administrators and the superintendent, the failure to advance any explanations for the employer's tardiness supports an inference that justifications were absent and perhaps were propounded after-the-fact to obstruct the process.

Similarly, when Jennings offered facts to justify the burden and expense basis for denying the Choate request, Jennings completely failed to provide any evidence bearing upon the crucial issues of staff cost and other staff duties and priorities. When this omission is coupled with the documentary search-time estimates, shown by cross-examination to be vague guesswork at best and greatly inflated at worst, significant doubt is raised about the substantiality of the District's burden assertion.

A comparable criticism can be made about Jennings' failure to offer evidence and explanations related to the District's privacy assertion. In fact, the sole mention of a closed session confidentiality policy that the school board "should" follow, in Jennings' account, was in response to leading questions on his final redirect examination. Other than this, the record is barren of any evidence of practice, board regulation or statutory authority bearing upon the employer's privacy claim. This is so despite the fact that Jennings, as personnel director, presumably was in a position to know and offer evidence of District policy and practice relevant to the issue.

Overall, the multiple problems with Jennings' testimony, when taken together, suggest that his account and justifications were not trustworthy. The claims he advanced on behalf of the District should be discounted and the opposite of his version should be believed.[13]

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[13]The Supreme Court has stated:

> For the demeanor of a witness " . . . may satisfy the tribunal, not only that the witness' testimony is not true, but that the truth is the opposite of his story; for the denial of one, who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance or defiance, as to give assurance that he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies." (NLRB v. Walton

CONCLUSIONS OF LAW

As a general rule, the PERB requires an employer to disclose information relevant to the representation of employees in negotiations and in monitoring contract compliance. Stockton Unified School District (11/3/80) PERB Decision No. 143; Mt. San Antonio Community College District (6/30/82) PERB Decision No. 224; Azusa Unified School District (12/30/83) PERB Decision No. 374. This policy is designed to facilitate effective bargaining and dispute resolution. Failure to provide relevant information is deemed a refusal to bargain in violation of section 3543.5(c).[14]

The first legal issue to be resolved is whether the requested information was relevant to the pending grievances. This determination is not a decision on the merits of the

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Mfg. Co. (1962) 369 U.S. 404, 408, quoting Dyer v. MacDougall (2nd Cir. 1952) 201 F.2d 265, 269.)

[14]PERB has expressly relied upon precedent under the National Labor Relations Act (NLRA) in arriving at this interpretation of section 3543.5(c). See Stockton Unified School District, supra, at pp. 12-19. Section 3543.5(c) of the EERA is similar to section 8(a)(5) of the NLRA, which also prohibits an employer's refusal to bargain in good faith. And section 3540.l(h) of the EERA, which defines "meeting and negotiating" is similar to section 8(d) of the NLRA, which defines the comparable duties of parties under that legislation. (See 29 U.S.C, secs. 158(a)(5) and 158(d).) The construction of similar or identical provisions of the NLRA may be used to aid interpretation of the EERA. San Diego Teachers Assn. v. Superior Court (1979) 24 Cal.3d 1, 12-13; Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608, 615.

contractual claim stated in the grievance. NLRB v. Acme Industrial Co. (1967) 385 U.S. 432, 437 [64 LRRM 2069]. Instead, the standard of relevance is more liberal and is akin to that used in a civil discovery examination where the precise dispute has not yet been framed and prepared for trial. Id., 385 U.S. at 437, n. 6. Under this approach, an employer must provide the requested information if it likely would be relevant and useful to the union's grievance determination and to fulfillment of its statutory representation duties. Id., 385 U.S. at 437-438. As the court observed,

> [a]rbitration can function properly only if the grievance procedures leading to it can sift out unmeritorious claims. (Ibid.)

Applying this standard, the information sought by the Association for the Gurney and Choate grievances was plainly relevant. The Gurney request concerned the date and basis of staff classifications and courses offered. Such information was crucial to resolution of the ultimate dispute over whether Gurney should have been hired as a temporary teacher (perhaps with probationary status) instead of being hired as a substitute for the first three weeks of the school year. Indeed, the District has never disputed the relevance of the Gurney request.[15]

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[15]Given the outcome of the Gurney arbitration hearing, denying Gurney relief because she was hired as a substitute, the District has now argued in its brief that she was not part

In the Choate case the District did assert a relevance objection, admittedly in a belated fashion at the superintendent's second-step response. However, his assertion missed the point of the grievance when he claimed that the records of other employees bore no relation to Choate's personal entitlement to a leave. In order to sustain a claim of contract misapplication and of a discriminatory leave denial and threatened reprimand, as was alleged in the Choate grievance, there may be no better evidence than the records of other employees in comparable situations.[16]

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of the bargaining unit and was barred from using the grievance machinery, even if she later was rehired as a temporary employee. The objection is rejected. First, at the time the grievance was pursued the issue of Gurney's proper status when hired in 1983 was the central issue. Her contract claim was certainly arguable. Even the arbitrator found that Gurney did the actual work of a temporary teacher. Second, the Association could have filed a grievance, independent of Gurney, to ensure the integrity of the contract's temporary teacher reemployment provision. Under this approach, an exclusive representative would be entitled to information regarding non-unit employees when such information would be relevant to policing the administration of an agreement for unit employees. (San Diego Newspaper Guild v. NLRB (9th Cir. 1977) 548 F.2d 863 [94 LRRM 2923].) This doctrine applies to cases alleging improper exclusion of employees or removal of work from the bargaining unit. (See, e.g., NLRB v. Goodyear Aerospace Corp. (6th Cir. 1968) 388 F. 2d 673 [67 LRRM 2447]; ~~Curtiss-Wright~~ v. NLRB (3rd Cir. 1965) 347 F.2d 61 ~~[59 LRRM 2433]~~.)

[16]Accord C & P Telephone Co. v. NLRB (2nd Cir. 1982) 687 F.2d 633 [111 LRRM 2165, 2168] (discipline of other employees for poor attitude relevant to alleged discrimination); Sweeney & Co. (1981) 258 NLRB 721 [108 LRRM 1172] (vacation schedules of other employees related to discipline for excessive absences).

However, relevance aside, the District has offered additional justifications for its refusal to provide the information.

In the Gurney case, the District has argued that the grievant and/or the Association already possessed answers to the questions propounded. In this regard, the employer relies on Gurney's answers at the arbitration hearing, when it seems the objection was first raised. However, not only does the transcript suffer from uncertainty because of inaudible portions, but it offers no admission showing Gurney's knowledge of the vital projection figures utilized for the principal's employment decisions.

In any event, the Association was entitled to secure the information for the reasons presented by Hackett, the grievance committee chair; namely, a desire to develop a record to verify the Gurney account and to make an independent judgment about whether the case should be pursued.[17] Since the committee's

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[17]The Association's verification and merit-determination objective was in accord with long-established precedent related to information disclosure requests. See, e.g., NLRB v. Acme Industrial Co., supra, 385 U.S. at 437-438; J.I. Case Co. v. NLRB (7th Cir. 1958) 253 F.2d 149 [41 LRRM 2679, 2683]; C & P Telephone Co. v. NLRB, supra; P. R. Mallory & Company, Inc. v. NLRB (7th Cir. 1960) 411 F. 2d 948 [71 LRRM 2412, 2417]. As one court stated:

> With the information thus supplied, the union can make an intelligent appraisal of the merits of the members' complaint and an informed decision on whether to process the

adverse recommendation could be appealed to the Association's executive board, and since the organization is subject to a duty of fair representation in making grievance processing determinations (Castro Valley Unified School District (10/25/78) PERB Decision No. 149), the Association's rationale was both reasonable and responsible. Moreover, would not an employer be the first to complain if a union ignored the equitable solution goal of the grievance procedure by filing a grievance without first checking the facts, especially those that would be easy to produce and verify, as in this situation?

At the hearing and in its brief, the District also contended that the Gurney request was properly refused because it questioned the District's management right to make staffing decisions. But this objection, again belatedly made, mischaracterizes the Association's theory of the grievance. The organization did not challenge the District's right to determine either who was qualified for a job or programs to be offered to students. Rather, the Association contested the manner and method of the non-contract classification that was

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> grievance. In the internal steps of the agreed procedures, the union can negotiate on a foundation of fact which may dispense with the need for arbitration or reveal that arbitration is unwarranted. The ultimate goal of industrial peace, upon terms voluntarily accepted by both sides, may thus be achieved. (Ibid.)

assigned to Gurney and the resulting loss of contract benefits, including possible probationary status as a regular employee. Assembling the facts relevant to this grievance would not infringe at all on hiring determinations or on the programs that the employer, in good faith, decided to make available for students.[18]

The objections advanced by the District on the Choate case—burden and privacy—also fail as adequate justifications. First, the evidence related to burden was insufficient in terms

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[18]As one leading labor law commentator has observed,

> [t]he Board and the courts have also uniformly required disclosure of . . . information on employee job classifications and how they are determined, information about employee status and job changes, time-study material, and information used in setting wage rates or incentives. (Morris, The Developing Labor Law (2nd ed. 1983), *p.* 625 (citations omitted).

For example, in P.R. Mallory & Company, Inc. v. NLRB, supra, the court reasoned that disclosure of employer figures regarding the "availability of incentive work" was important in determining the proper compensation rate under the contract (71 LRRM at 2413), just as in this case the inquiry about known availability of art coursework and related enrollment projections was related to Gurney's claim for a higher temporary teacher salary. And in Local Electronic Systems (1980) 253 NLRB 851 [106 LRRM 1061], the NLRB ordered production figures disclosed in connection with a union grievance claim that non-contract research work had given way to production activity for employees covered by the bargaining agreement. The same argument could have been made on Gurney's behalf without interfering with a management right to select the work that gets done.

of precise cost and time factors to sustain the District's refusal. To the extent there was limited evidence that was offered by Jennings, it must be viewed as overstating the impact of the request in light of his bias and his untrustworthy demeanor and responses. And the failure of the employer to seek any production or cost compromise casts further doubt on its objection.

The only legal authority cited as support on the burden issue in the employer's brief points entirely in the opposite direction. See NLRB v. Borden, Inc. (1st Cir. 1979) 600 F.2d 313 [101 LRRM 2727]. In Borden a union's request for substantial company-wide personnel and insurance cost figures was enforced:

> . . . the Board held that Borden did not meet its obligation to obtain the requested information, to investigate alternative methods for obtaining the information, or to explain or document the reason for its unavailability. (Id., 101 LRRM at 2729.)

The federal court expressly rejected the employer's,

> . . . attempt to slough off its responsibility to bargain in good faith by claiming that it did in the main provide the Union with some information. . . . (Ibid.)

Noting that the union could have polled employees,

> . . . recourse to the Company was simpler, more efficient, and seemingly not overly burdensome to the Company. (Id., 101 LRRM at 2730.)

The court concluded that,

> . . . a company may not play dog-in-the-manger just to put the Union through the hoops. (Ibid.)19

The District's privacy or confidentiality objection, raised by the superintendent, also suffers from the absence of legal or evidentiary support. Not only did the District fail to raise this as an affirmative defense, but the employer has not cited a single statute or case authority to support its claim. Further, the testimony about confidentiality policy or practice was weak, bordering on non-existent. Thus, there was no

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19[19]A recent federal case involving an unlawful failure to provide health and safety information contains an analysis that could apply equally to the present proceeding:

> In the instant case . . . Respondent offers no substantiation to its claim that the request would be prohibitively expensive in time, labor and resources to fulfill. Respondent merely points to the breadth of the language of the Union's written request and, later, attempts to rely on the estimates of DOE regarding an entirely different type of information request in support of its position. Further, the genuineness of Respondent's claim is undermined significantly by the absence of any effort by Respondent to seek clarification from the Union in order to narrow the issues included within the request. Instead, Respondent ignored the Union's inquiries and only belatedly attempted to fashion an excuse for its conduct. Accordingly, we reject Respondent's contention that the burden of compliance absolves it of responsibility. (Goodyear Atomic Corp. v. NLRB (6th Cir. 1984) ~~---~~ F.2d ~~---~~ [116 LRRM 3023, 3024], quoting ~~266~~ NLRB No. 160 [113 LRRM 1057].)

showing that documentary material regarding partial-paid and personal necessity leaves would fall within statutory privacy protections, even if the submitted documents were later included within personnel files that otherwise contain some protected information. In fact, the evidence showed that neither the contract language defining the two leaves of absence, nor the document used for submitting requests, raised, on their face, privacy promises or protections.

Even if inclusion within personnel files might support the District's assertion of a confidentiality interest that precluded direct Association access, this would not by itself justify an outright refusal to segregate and produce relevant documents. Instead, if the District was concerned about the privacy and identity of other employees, the District should have proposed a counter-offer to separate the records or delete the names, or advanced some other appropriate compromise.[20] Moreover, reasonable doubt about the sincerity of the District's privacy concern is underscored because of the

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[20]See, e.g., Emeryville Research Center (Shell Oil Co.) v. NLRB (9th Cir. 1971) 441 F.2d 880 [77 LRRM 2043] (no violation because of employer willingness to explore alternative forms of disclosure); Detroit Edison Co. v. NLRB (1979) 440 U.S. 301, 318, fn. 14 [100 LRRM 2729] (employer's compromise disclosure proposals acceptable to preserve confidentiality); Goodyear Atomic Corp. v. NLRB, supra, 116 LRRM at 3024; Morris, Developing Labor Law, supra, at pp. 614-617.

employer's failure to seek a disclosure compromise with the Association once the organization conveyed its willingness to accept a limitation, an indication expressed within days of the District first presenting its privacy objection two months and two grievance steps after the request had been made.[21]

In the end, the absolute refusal by the District to produce the relevant information for the Gurney and Choate grievances, and the failure to propose any alternative form of discovery, was not justified by any employer showing that outweighed the right of the grievants and the Association to secure the

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21This conclusion is strengthened, not altered, by Jennings' testimonial allusion to a possible compromise offer made by employer counsel, perhaps after this unfair practice charge was filed. Despite Jennings' uncertainty and the importance of the issue for the District's defense, no competent evidence was offered by the employer to explain or substantiate the vague suggestion in Jennings' testimony.

The District's failure to treat the Association's information requests promptly, and its silence as to possible compromise, is all the more surprising because of a prior unfair practice finding against this same employer for refusing to provide grievance-related information. Administrative notice may be taken of PERB Case No. S-CE-498, involving the same parties and counsel, decided by an administrative law judge on May 3, 1983. While exceptions to the Board have been filed by the employer and the pending decision may not be cited as precedent, plain sense suggests that the District was aware, when the Gurney and Choate cases arose less than one year later, of both the general legal principles governing information disclosure and the Association's readiness to pursue its statutory rights. Hence, with this background, the District's uncooperative and recalcitrant posture was remarkable.

information requested. The District's refusal to provide the relevant information for grievance processing tended to and actually interfered with the Association's ability to effectively carry out its representational duties. For example, the Gurney case went all the way to arbitration without disclosure of the enrollment projections and student preference tallies used for the ultimate staffing classifications. Further, the arbitrator apparently was left with a record, contrary to contract provisions, that did not include the best documentary evidence sought by the Association and that was limited to previously undisclosed testimonial recollection of the different figures used by local and central administration management officials. Under these circumstances, the Association could not fairly evaluate the merits of the Gurney claim, nor present a full case before the arbitrator.

The Choate case also suffered as a result of the District's refusal since potentially probative evidence related to the disparate treatment theory of the case was withheld. While no arbitration had taken place at the time of the unfair practice hearing, presumably the Association again would encounter difficulties in assessing the merits of its case and in preparing for an arbitration hearing.

In each instance, therefore, the District's conduct violated section 3543.5(c) of the Act, and concurrently

violated sections 3543.5(a) and 3543.5(b), by interfering with an employee's right to have representation on a contract grievance, by interfering with the Association's right to represent employees, and by interfering with administration and enforcement of a bargained-for collective agreement.

REMEDY

Section 3541.5(c) of the Act states:

> The board shall have the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

A cease-and-desist order is the customary and appropriate remedy for the failure to provide relevant information for representation of unit employees. Stockton Unified School District, supra; Azusa Unified School District, supra.

Additionally, certain affirmative action by the employer is warranted by the facts of this case. Although the evidence suggests that the outcome of the employer's earlier personnel decisions might not change, nevertheless, upon request by the Association, the District should produce the information and documents previously sought by the Association. Mt. San Antonio Community College District, supra. Accord Goodyear Atomic Corp. v. NLRB, supra, 116 LRRM 3023; Chesapeake and Potomac Telephone Co. (1981) 259 NLRB 225 [109 LRRM 1019] enf. C & P Telephone Co. v. NLRB, supra; La Guardia Hospital

(1982) 260 NLRB 1455 [109 LRRM 1371]. If a further request is made, the District should permit the grievances to be reopened. Cf. Lemoore Union High School District (12/28/82) PERB Decision No. 271 (ordering that job selection process be reopened). This affirmative action, if requested by the Association or by the employees, in the event the Association declines to proceed with either or both cases, will allow full exercise of the grievance-processing machinery and is the only way to effectively restore statutory rights that have been abridged.

It also is appropriate that the District be required to post a notice incorporating the terms of the order. The notice should be subscribed by an authorized agent of the District indicating that it will comply with the terms thereof. The notice shall not be reduced in size. Posting such a notice will provide employees with notice that the District has acted in an unlawful manner and is being required to cease and desist from this activity and to take certain affirmative action, if requested by the charging party. It effectuates the purposes of the EERA that employees be informed of the resolution of the controversy and Will announce the District's readiness to comply with the ordered remedy. See Placerville Union School District (9/18/78) PERB Decision No. 69; Pandol and Sons v. Agricultural Labor Relations Bd. (1979) 98 Cal.App.3d 580, 587; NLRB v. Express Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415].

Beyond the relief just described, the Association has requested other remedies because the District is "an obdurate employer" and a "repeat offender." (CP. Brief, p. 13.) Thus, the Association seeks reimbursement of the costs of litigation, including the expenses of the arbitration proceeding, reasonable attorney fees, and transcript and other costs. In support of this request, the Association cites several other unfair practice cases involving the District.

The Association's request can be sympathetically viewed, although not because the other cases, largely on appeal at this time, demonstrate a lawless employer nature. Rather, sympathy is prompted because the District's conduct was egregious in its disregard for the responsive bilateral grievance procedure, particularly by its failure to promptly respond to requests, even with an objection, and by its patent unwillingness to compromise. Further, because the District's effort to advance justifications was marked by untimely assertions, little or no evidence and an absence of legal authority, it can be argued that the employer tried to make a mockery of the contract grievance machinery as well as PERB's unfair practice procedures. Simply stated, minor disputes such as this should not consume so much time and taxpayer money, nor be used as a vehicle to display an employer's ill will.

But despite the sympathetic ear for the Association's special requests, the Board has concluded that PERB's remedial

authority is strictly limited, applying a standard utilized by the NLRB and the federal courts. Hence, attorney fees and related litigation costs are awarded only if a party's case is without any arguable merit, and has been frivolous or dilatory litigation pursued in bad faith. King City High School District Association (3/3/82) PERB Decision No. 197, p. 26; Chula Vista City School District (11/8/82) PERB Decision No. 256, p. 8. While the District's claims may have been belatedly made and poorly supported, if at all, given the absence of additional Board precedent establishing standards for information disclosure obligations and objections, it would be hard to claim with confidence that the defenses were not debatable. See also Eastern Maine Medical Center (1981) 253 NLRB 224 [105 LRRM 1665] enf. (1st Cir. 1981) 658 F.2d 1 [108 LRRM 2234]; Admiral Merchants Motor Freight, Inc. (1982) 265 NLRB No. 16 [111 LRRM 1526]. However, to the extent the District pursues such claims in the future, having had its defenses rejected, it may encounter a reimbursement order that was narrowly avoided this time around. Hedison Manufacturing Co. v. NLRB (1st Cir. 1981) 643 F.2d 32 [106 LRRM 2897, 2900].

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, and pursuant to section 3541.5(c), it is found that the District violated

Government Code sections 3543.5(a), (b) and (c). It is hereby ordered that the Modesto City Schools and High School District and its representatives shall:

1. CEASE AND DESIST FROM:

Interfering with an employee's right to representation, with the right of an employee organization to represent employees, and with the administration of a negotiated agreement, by refusing to furnish information relevant to grievances filed on behalf of Patricia Gurney and Leonard Choate.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

(a) Upon request made by the Association within ten (10) days of the date this order becomes final, furnish the charging party with the information previously requested concerning the Patricia Gurney and Leonard Choate grievances.

(b) Upon further request made within ten (10) days of receipt of such information, at the election of the exclusive representative or the respective employees, reopen the Patricia Gurney and Leonard Choate grievances to allow a full opportunity for the presentation of additional evidence and argument.

(c) Within ten (10) workdays of service of a final decision in this matter, post at all school sites and all other work locations where notices to employees are customarily

placed, copies of the notice attached hereto as an appendix. The notice must be signed by an authorized agent of the District indicating that the District will comply with the terms of this order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that the notice is not reduced in size, altered, defaced or covered by any other material.

(d) Upon issuance of a final decision, make written notification of the actions taken to comply with the Order to the Sacramento Regional Director of the Public Employment Relations Board in accordance with her instructions.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on October 29, 1984, unless a party files a timely statement of exceptions. In accordance with the rules, the statement of exceptions should identify by page citation or exhibit number the portions of the record relied upon for such exceptions. See California Administrative Code title 8, part III, section 32300. Such statement of exceptions and supporting brief must be actually received by the Public Employment Relations Board at its headquarters office in Sacramento before the close of business (5:00 p.m.) on October 29, 1984, or sent by telegraph or certified United States mail, postmarked not later than the last day for filing in order to be timely filed. See California Administrative

Code, title 8, part III, section 32135. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall be filed with the Board itself. See California Administrative Code, title 8, part III, sections 32300 and 32305.

Dated: October 9, 1984

BARRY WINOGRAD
Administrative Law Judge